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Australian Sex Workers Association

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Thank you for the opportunity to submit to the Senate Committee currently reviewing the *Online Safety Bill 2021.* This is our third submission on the legislation since the Department began to seek public comment in 2019.

About Scarlet Alliance

Scarlet Alliance, Australian Sex Workers Association, is the national peak sex worker organisation in Australia formed in 1989. Our membership includes individual sex workers and sex worker organisations, projects and collectives throughout Australia. Scarlet Alliance uses a multifaceted health promotion approach to strive for equality, justice and the highest level of health for past and present workers in the sex industry. We achieve our goals and objectives by using best practices including peer education, community development, community engagement and advocacy.

Scope of this submission

Our recent submission to the Department's call for public comment on the exposure draft Bill remains largely relevant. We have had the opportunity to review the changes made since that exposure draft's release, and do not believe that the Bill, in its current form, will succeed in protecting the online safety of all Australians. In this submission, we raise questions about the process with which the Online Safety Bill is being considered in Parliament, request transparency about community feedback and government process, and again urgently request consideration of the important issues relating to discretion, power and oversight of the eSafety Commissioner, the impact of the proposed legislation on sex worker livelihoods and safety, the overreach and relevance of the Online Safety Scheme, and the potential 'chilling effect' of platforms in response to the Basic Online Safety Expectations. We also continue to suggest a more comprehensive approach to understanding consent in the Non-Consensual Intimate Images section of the Bill.

Sex workers have a unique perspective on the Bill as a community with a long history of censorship, marginalisation, and experience of online targeting, abuse and erasure. We are often the canary in the coal mine when it comes to new measures of censorship and control. We are already knowledgeable about the impact of legislative and algorithmic overcapture and policy design that allows sex worker livelihoods and safety to be traded for the perceived 'protection' of vulnerable people online. Our lived experience reveals the weak spots in these policy approaches, which is in its creation of further vulnerability for sex workers as we lose access to income, safety tools and strategies, and vital peer connections.

eSafety for all Australians

We commend a number of the Bill's mechanisms for protecting the safety of Australians online, and agree in principle with the idea that we must have robust standards for regulating actual and serious harms perpetrated by online content. The Bill seeks to address very real issues regarding online abuse.

We believe that such regulatory measures work best when coupled with education about media literacy and consent for people of all ages, including young people. The online environment presents complex regulatory challenges that require well-designed solutions that are able to be accessed by the whole community.

We have significant concerns, however, with the way the Bill frames online harm and safety, and with the way it fails to consider the impact of action taken under the Bill on sex worker safety, both online and in real life. We urge consideration of the 'chilling effect' likely to result from the intersection of the Online Content Scheme and the Basic Online Safety Expectations, for which there is already significant precedent in similar legislation (FOSTA-SESTA) in the United States. In 2020, members of Congress introduced the *SAFE SEX Worker Study Act* to the United States Senate specifically examine the effects of FOSTA/SESTA on consensual adult sex work. Put simply, when platforms are incentivised to remove all sexual content, as they are through the requirements of the Basic Onlince Safety Expectations (BOSE), they will work to over-comply, capturing content that may or may not actually be illegal and leaving those impacted with little recourse as private companies become proxy censors.

By positioning all sexual content as potentially damaging to and giving the eSafety Commissioner power to investigate at will and issue notices as they 'think fit', the Bill fails to differentiate between actual harm and a subjective, moralistic construction of harm. The Bill does not define harm itself, nor does it create a provable threshold of harm that can be used in the Commissioner's decision-making processes. In concentrating power in a single un-elected office, it silos power and control over perceiving and acting upon harm in a way that lacks transparency or accountability to the Australian public or connection to the intersectional Australian community.

Procedural issues with the Bill

We note that at the first reading of the Bill on 24 February, Minister Fletcher reported receiving 376 public submissions on the exposure draft Bill. We are extremely concerned that,

a) At the time of writing, those submissions have not been made public.;
b) The 7-working-day window for consideration of those public submissions before the Bill saw its first reading in the House seems incredibly short given the volume of submissions;
c) The 3-working-day window given for public submissions to the Senate Committee is also unreasonably short.

We are concerned that the Bill, which gives substantial powers to an unelected official to do a large body of regulatory work with minimal oversight, is being rushed through Parliament. Legislation of this nature requires a careful process with adequate timelines for consideration that is transparent and accountable to the Australian people, particularly those most impacted by its consequences. The sex worker community is among that population, and we do not believe that adequate attention has been given to the issues this raises. We hope that this submission can encourage further engagement with our concerns as discussion of the Bill continues.

Our recommendation for amendments is as follows:

General oversight and powers of the Commissioner:

1. Introduce a 24-month sunset clause and 12-month periodic review. (The current review requirement is 3 years after adoption.)

2. Establishment of a multi-stakeholder review board for the activity of the Commission, designed to be representative of the Australian community and include members of marginalised groups and communities disproportionately affected by deplatforming and censorship, including sex workers.

Part 6: Non-Consensual Intimate Imagery

1. The Bill should clarify that a person can withdraw their consent to the posting of intimate images;
2. The Bill should clarify that a person can place qualifications on their consent to the posting of intimate images, including the duration of time they can be posted, the places in which they can be posted and who has permission to post them.

Part 9: Online Content Scheme:

1. Introduce a requirement for annual publication of disaggregated data on the issuing of block, remedial and removal notices and the Commission's reasons for issuing them, both for transparency and accountability to the public and to provide information for Australians about how to comply;
2. Introduce an appeals process for wrongful removal of content, allowing those impacted to appeal without the burden of accessing the court system;
3. Introduce liability of the Commission to pay civil penalties when the Commissioner orders the removal of content where that removal is inappropriate, erroneous or unjustified;
4. Introduce a requirement for development of decision-making criteria on the issuing of notices under the Online Content Scheme to be conducted by a multi-stakeholder, intersectional board.
5. Remove 'Class 1' and 'Class 2' categories which import the outdated *Classifications Code (2005)* and equate all sexual content with harmful content;
6. Introduce a provable threshold of negative impact to trigger an investigation by the Commissioner and remove the ability to investigate when they 'think fit';
7. The resolution of incidents detailed in 27 (1) (p) (ii) should not only be timely and appropriate but must also be 'transparent' and 'accountable';
8. Require consultation with all industry stakeholders - including sex industry stakeholders - in the development of a 'restricted access system' (108) that is approrpriate and practical to be implemented by small businesses and sole traders.

POWERS OF THE COMMISSIONER

One of our key concerns about the Bill is that it affords disproportionate power to an unelected public bureaucrat to decide what types of content are viewable to Australian end-users. The Commissioner is able to delegate functions and powers to administrative decision-makers to make critical decisions about what kind of content is offensive and harmful, and the criteria for this decision-making are determined solely by the Commissioner. Further, the Commissioner can remove content that is not harmful, nor illegal, but simply something they consider to be inappropriate.

This power, combined with both a lack of oversight or rigorous public reporting requirements, leaves room for the individual holding this position to approach their task with a great deal of subjectivity and little accountability. We raise concern for the ways in which any Commissioner's political agenda, organisational or religious affiliations, and personal moral code may impact the process and outcomes

of their decisions, particuarly where they are informed by stigma surrounding sex work and / or a failure to acknowledge it as a largely legal and legitimate occupation.

We note, for example, current Commissioner Inman Grant's comments targeting online platform OnlyFans, which is widely used for content sales by sex workers, as a site of 'sextortion' and 'image-based abuse'. For many sex workers, OnlyFans is also a workplace, and must be conceivable to the Commissioner as such in order for them to make sound decisions that do not impede our ability to choose how and where we work.

While users are given the option of appealing to the Administrative Appeals Tribunal, the extraordinary discretion afforded to the Commissioner to make decisions as they see fit makes appeals relatively fruitless and places onus on a person who has already suffered damages the burdensome and resource-intensive process of accessing the court system. Within the Online Content Scheme, there is no process outlined for users to be notified that their material may be removed, no notice period offered to them, and no opportunity for them to be given a hearing to speak or write back in relation to the complaint. The expedited 24 hour time frame removes any opportunity for the Commissioner to develop or communicate considered reasons.

That the office of the Commissioner is indemnified from liability for civil damages to those suffering the consequences of inappropriate or even illegal notices issued by the Commissioner is cause for further concern. The mechanisms for accountability **must** be proportionate to the power held. It is for this reason that we make recommendations for a number of the accountability measures listed above, including a 12-monthly review of activity conducted under the Bill to ensure that the significant discretionary power of the Commissioner is being used to promote the safety of ALL Australians.

APPROACH TO CONTENT REGULATION IS UNFIT FOR PURPOSE

The import of the Classifications Code, the categorisation of all sexual content as harmful content, the authority given to the Commissioner to determine a restricted access system, and the drastic expansion of scope in the proposal[1] that 'the eSafety Commissioner lead in the development of a comprehensive roadmap that would adequately address the complexities of regulating online pornography' are our primary concerns regarding the Online Content Scheme. The latter has been significantly downplayed in the Minister's and Commissioner's characterisations of the Bill in media, which has focussed primarily on image-based abuse and cyber-bullying. In the interest of avoiding overlooking the important issues presented by the Online Content Scheme, we detail our concerns here.

Need for new approaches to content regulation that keep sex workers safe

We appreciate that technological advance warrants new approaches to the difficult task of content regulation. Existing regulatory frameworks for the classification of films, publications and computer games and broadcasting services are insufficient to capture the platforms and services through which users share media content, as evidenced by repeated failed attempts to revise this framework. We note the importance of keeping both the eSafety Commission and privatised platforms transparent and accountable for content moderation decisions.

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[1] Explanatory Memorandum: Online Safety Bill 2021 https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6680_ems_3499aa77-c5e0-451e-9b1f-01339b8ad871/upload_pdf/JC001336%20Clean4.pdf;fileType=application%2Fpdf

Sex worker safety must be considered an important and relevant issue in drafting a general framework for online safety. The Bill does not define 'safety', but the language used to conceive of it is preoccupied with young people's ability to access sexual material. We advocate for a holistic consideration of safety for all Australian internet users with regard for how marginalised communities construct safe spaces online and how their safety in real life is impacted by their exclusion from online spaces, which we will discuss in a later section.

Replicating the problems of classification and broadcasting laws

In its importing of the Classifications Code into its 'Class 1' and 'Class 2' categories, the Bill replicates and reproduces the problems of existing classification and broadcasting laws, which have long been critiqued by industry and civil society stakeholders. The Classification Code has undergone multiple attempts at reform over the last decade without success. Rather than taking the opportunity to innovate a new framework for regulating the unique environment of online content, the Bill simply defers to an outdated and dysfunctional system and, in so doing, captures virtually all sexual content in its framework of harm, again positioning the people who produce this content, including sex workers, as always already perpetrators of harm from whom children must be 'protected'.

Problems with RC / X18+ categories

There are many problems with the definition of X18+ in the *National Classification Code 2005*. It is extremely narrow in its scope. It expressly precludes the depiction of fetish material even where those activities are perfectly legal to perform. It also precludes 'violence', which can be understood so broadly as to potentially include rough sex, dirty talk, and unrealistic violence. It also precludes the depiction of anyone who 'appears to be' under 18, which can capture youthful-appearing adults engaged in consensual activities. Any content that includes such material as well as depicting explicit sex (even if they are unrelated) will be Refused Classification and constitute Class 1 material.

The X18+ category has been criticised for producing adult content that is heteronormative and ableist, because of the unsophisticated ways it understands and regulates representations of sex, bodies and sexual practices.[2] As a result of the current definition, the Classification Board has instructed trainees that content featuring women with small breasts (which may be mistaken as 'under-developed') may be Refused Classification, and Customs Officers have misinterpreted g-spot ejaculation to be golden showers (a 'fetish') and therefore Refused Classification.[3] At present, activities that are legal and consensual to engage in can be Refused Classification. It is a mistake to merely impute the existing flawed classification categories onto a new *Online Safety Act*, both because of the problems inherent in those categories, and because of the impossibility of effectively monitoring the volume of online content that could contain this material.

Problems with Class 2

We are concerned about the broad definition of Class 2, which captures all R18+, X18+, and Category 1 and 2 Restricted materials under the *National Classification Code* without delineation. There is wide variation between all of these categories, which capture material that simply includes nudity or implied

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[2] Thorneycroft, R. (2020). If not a fist, then what about a stump? Ableism and heteronormativity within Australia's porn regulations. *Porn Studies*, *7*(2), 152-167; Stardust, Z. (2014). 'Fisting is not permitted': Criminal intimacies, queer sexualities and feminist porn in the Australian legal context. *Porn Studies*, *1*(3), 242-259.

[3] Counihan, B. 'Weird Politics of Small Boobs and Body Fluids'. *Sydney Morning Herald*. 29 January 2010.

sexual activity (Category 1) as well as simulated sex (R18+) and actual sex (X18+). At present, this material is lumped together with no criteria to guide the Commissioner's decision-making about what warrants a removal notice. Again we recommend that such criteria be developed by a multi-stakeholder group that includes sex industry stakeholders.

If the Bill is concerned with identifying potential harmful online content, then there is no reason why X18+ content should be in Class 2 at all. X18+ category is currently the only category (besides G for General Audiences and PG for Parental Guidance) that actually excludes violence. The Bill simply conflates sexual content with harmful content on no basis, again failing to clearly define what makes this content problematic.

IMPACT ON SEX WORKER SAFETY

Online tools are a lifeline for sex workers

The ability for sex workers to access online platforms, tools and communities has a direct correlation with our safety at work, online, and in real life. This section will explore this correlation and comment on the potential harm caused in further deplatforming of sex workers and the tools we use for work that is likely to result from the passage of the Bill in its current form.

Sex workers use a combination of adult-specific and general public platforms to earn a living and stay safe at work, whether that work is conducted online or in person. We use them for conducting business by advertising our services, negotiating with clients, selling content or products, providing our services, and using financial services. We use them to stay safe at work through the sharing of safety information and strategies, conducting peer education on a variety of health and workplace health and safety topics, sharing harm reduction information, and building the communities that often support us and our safety at work, particularly when our work is stigmatised or even criminalised. We also use them to give and receive peer support and referrals to services, establish mutual aid networks, and connect with others who share experiences of stigma, discrimination, and marginalisation.

In addition to the ways in which digital tools support us to stay safe at work, they also support us in our private lives and our general experiences of online safety. Sex workers already experience a number of harms online that are directly related to our experiences of sigma and discrimination, including stalking, doxxing, and malicious reporting. Our ability to protect our privacy by separating and protecting our work and personal identities online, stay linked in with peer networks, safety information and harm reduction tools require our access to the tools, platforms and services which are rapidly slipping from our grasp.

Precedent for damage caused by incentivising deplatforming of sex workers

Over the past few years, particularly since the 2018 introduction of the FOSTA-SESTA legislation, we have begun to suffer the consequences of legislation that, through broad language enabling signficant overcapture, encourages both the removal of sex workers from general platforms, and the targeting of adult platforms including hook-up apps, sex education platforms, and platforms where sex work takes place. This causes not only the loss of essential tools for earning income and sharing workplace health and safety information, but also threatens the digital citizenship of individual sex workers and sex worker organisations who, despite attempting to comply with an ever-changing set of standards and requirements from large platforms, are subject to mass account shutdowns, shadowbans, and loss of

private peer-only digital spaces, whether due to targeting of specific content or algorithmic overcapture.

While we note that there are significant differences between the objects and remits of FOSTA-SESTA and the *Online Safety Bill*, FOSTA-SESTA provides a useful case study on the impact of legislation that creates an incentive for platforms and internet services to act to avoid liability by removing any content that may fall within the broad scope of its framework. It also provides practical lessons from the employment of artificial intelligence to carry out that content removal, which runs the risk of overcapture due to algorithmic bias and an inability to successfully analyse the nuances of context.

There is a growing body of research on the impacts of FOSTA-SESTA on sex workers across the globe.[4],[5] Australian sex workers continue to suffer its consequences in the loss of digital assets, community connections, and safety resources to increasingly risk-averse terms of use, shadowbanning, and the monitoring of platforms for particular words or images.

Potential for the Bill to cause a 'chilling effect'

The ability of the Commissioner to require platforms and services to report on how they have acted to conform to the Basic Online Safety Expectations, coupled with a number of hefty penalties for non-compliance with a variety of the Bill's requirements, will likely result in risk-averse behaviours from internet platforms and services. The difficulties of attempting to determine whether content is likely to be interpreted by users or by the Commissioner as 'Class 1' or 'Class 2', which requires an understanding of a Classification Code that is broad and ambiguous, is another incentive for them to simply remove or block content. Whether or not this is an intended effect of the legislation, it would be disingenuous for the Bill to credit itself with 'improving and promoting' the safety of all Australians online where it makes this effect possible.

Similarly, the requirement for a restricted access system is another barrier facing all platforms and services that wish to continue to host adult content. Because the Commissioner holds the power to determine what that system is, without a requirement to consult with stakeholders or the wider Australian public, we have significant concern about the feasibility and privacy issues created in the development of such systems, and how this might be a barrier to those remaining platforms and services still hosting adult content. Is it imperative that the Bill be amended to ensure that this system is cost-effective and easy to adopt, which can only be achieved through meaningful stakeholder consultation conducted throughout the process of its development, legislation and implementation.

NON-CONSENSUAL INTIMATE IMAGES

Sex workers can reasonably expect to be afforded privacy

The Bill creates a system whereby a person depicted in an intimate image can make an objection or a complaint about their intimate image being posted online. Intimate images include images of private parts (such as genitals, anus or breasts) or private activity (such as a state of undress or engaging in sexual activity) in circumstances in which an ordinary reasonable person would reasonably expect to be afforded privacy. The definition of 'intimate image' in s15(3) includes circumstances in which an ordinary reasonable person would reasonably expect to be afforded privacy (e.g. in a state of undress**,**

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[4] https://hackinghustling.org/erased-the-impact-of-fosta-sesta-2020/

[5] https://hackinghustling.org/fosta-in-a-legal-context/

using the toilet, showering, having a bath, engaged in a sexual act of a kind not ordinarily done in public, etc).

Sex workers should be understood as having a reasonable expectation of privacy. Even where sex workers have intimate images online for work-related purposes, we still have a reasonable expectation of privacy. For example, sex workers may reasonably expect that our photos will be used in work-related contexts, or on specific advertising platforms, or for a limited duration of time. Simply the fact of having intimate images online does not mean that a sex worker expects that content to be posted and shared without consent.

For sex workers, this part of the Bill could open up better access to redress if a client stealthily takes images or video in a session or session negotiation and posts it online, or if an individual or entity steal and re-post advertising content without the consent of the person depicted. This is an ongoing issue for sex workers that is only partially addressed by copyright law and state-based criminal laws on sharing non-consensual intimate imagery. Sex workers therefore should have equitable access to reporting and be understood as people who can reasonably expect privacy.

For sex workers, equitable access requires the ability to report content anonymously or under a pseudonym. There are many reasons why sex workers have concerns about giving their legal identity details to government bodies or officials, and should not be required to do so in order to access protection under the NCII section of the Bill.

Existing section does not recognise withdrawal of consent or limits on consent

Non-consensual intimate images are images where the person depicted did not consent to the posting of the image. However the Bill is unclear about what this means. While section 33(2) provides that the depicted person may make an objection even if they consented to the posting of the intimate image, it is still unclear whether consent can be withdrawn or qualified.

In some scenarios, sex workers may have consented to the posting of the image for certain purposes (such as advertising on a particular escorting website), but not consented to the posting of the image for other purposes or on other platforms (such as continued use of image after leaving the agency, or the pirating or distribution of the image across other platforms). It is a recurrent problem for sex workers that some businesses continue to use a worker's intimate images after the sex worker has terminated their relationship with the agency or establishment without permission. In some cases, they have sold them to other businesses and the photos virally proliferate across multiple mediums. However the removal of such images under current copyright protections remains difficult and ad hoc. The Bill needs amendment to recognise that a person should be able to withdraw their consent to the posting of intimate images and place limits on their consent by specifying how, where, and for how long the image can be posted.

Re-defining consent

In section 21, consent is defined as express, voluntary and informed. The *Online Safety Bill* can learn from the recent state inquiries into consent law reform in New South Wales, Victoria and Queensland. The recent NSW Law Reform Commission report on Consent in relation to Sexual Offences specifically recommends express provisions on consent that allow people to place limits on their consent. For example, it specifies that consent at one time does not mean consent at another time, consent to one activity does not include consent to another activity, and consent with one person does not mean

consent with another person.[6] The *Online Safety Bill* could have a similar provision that states that consent to posting an image on one platform does not constitute consent to post the image on another platform.

If you would like to discuss this further, please do not hesitate to contact National Programs Manager, Gala Vanting on npm@scarletalliance.org.au or (02) 9517 2577.

Sincerely,

Jules Kim
Chief Executive Officer
Scarlet Alliance, Australian Sex Workers Association

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[6] New South Wales Law Reform Commission (2020), *Consent in Relation to Sexual Offences*. Report 148. https://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Consent/Consent.aspx